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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FELIPE POLANCO DIAZ, Defendant and Appellant.	H033102 (Santa Clara County Super. Ct. No. CC510985)

A jury convicted defendant of first degree murder and found that he discharged a firearm, causing death. (Pen. Code, §§ 187, 12022.53.) He was sentenced to 50 years to life. On appeal, defendant contends that his conviction should be reversed, or reduced to second degree murder, because there was insufficient evidence of premeditation and deliberation. He also argues that the prosecutor committed prejudicial misconduct by misstating the law of manslaughter, and that the trial court committed prejudicial error by refusing to instruct the jury on voluntary intoxication in connection with the subjective component of voluntary manslaughter, and by refusing to allow defense counsel to argue that defendant's intoxication could be considered by the jury on the question whether he actually killed in the heat of passion. We will affirm.

STATEMENT OF FACTS

On November 12, 2005, at approximately 10:45 p.m., defendant shot Rafael Cruz three times. Cruz died at the door of Tango's Cantina, a bar on Union Avenue in San Jose. At the time of his death, Cruz's blood alcohol concentration measured 0.26.

The Shooting

According to bartender Hilda Pacheco, the Cantina had about 15 patrons that night. Rafael Cruz was a regular customer. Cruz arrived at the bar alone between 7:00 p.m. and 8:00 p.m. Pacheco served Cruz two beers. Violeta Valadez, one of the Cantina's owners, also served Cruz "about two beers." Then Cruz ordered a bucket of small Corona beers. Mary, a bartender also known as Maryelena or Mariaelena, was not working that night, but she came in as a customer and sat down next to Cruz and was talking with him. They talked for about an hour. Female bartenders were expected to socialize and sometimes dance with the patrons, and Mariaelena danced with Cruz.

According to Violeta Valadez, defendant arrived at the Cantina at approximately 9:00 p.m. She recognized him as a customer who had come to the bar before, "three times or more or less at the most." Over the next two hours, defendant socialized with everyone. Violeta kept a running bar tab for defendant. He ordered nine or 11 beers, some for himself and some for others. At one point that night, he danced with Mary (also called Meri or Mery), one of the bartenders who was working that night.[1]

Shortly after defendant arrived, he sat down next to Cruz at the bar and the two conversed. Later, they sat at a table, drinking beer and talking. To Jesse and Violeta Valadez, the Cantina's owners, their conversations seemed "friendly" and "normal." At

[1] According to Violeta Valadez, three women were tending bar that night: Hilda Yolanda, Mery (or Mary) and her. Another bartender, Mariaelena (or Mary) was not working that night; she was just visiting. She was the woman socializing with Cruz at the bar.

some point, Cruz and defendant were buying each other drinks. Around 10 p.m., Violeta saw the two men leave the bar and then come back after a short time.

At 10:45 p.m., Violeta heard what she thought were firecrackers outside.

Pacheco also heard a sound from outside the bar that sounded like firecrackers. She saw Cruz on his knees, pushing the door and causing it to open inward. Then he fell backwards. A man in a cowboy hat entered the bar seconds before Cruz fell through the door.

Teresa Flores, a patron, also heard "something like rockets" about four times. There were pauses between the noises. The she saw a man fall, face down, by the front door.

Socrates Vargas, the disc jockey that night, saw Cruz and thought he looked "somewhat" drunk, but "not too much." He was not acting hostile or aggressive. Later in the evening, Cruz and Vargas stepped outside to smoke a cigarette together. At that point, Cruz appeared to be "somewhat nervous"; he was looking around.
About five or six minutes after re-entering the bar, Vargas heard three gun shots in quick succession.

Jesse Valadez saw defendant seated at the bar next to Cruz, talking to him. After several minutes of conversation, Cruz and defendant went outside. About 15 minutes later, Jesse noticed Cruz and defendant sitting at a table together, drinking and talking. About 15 to 20 minutes after that, Jesse Valadez heard three gunshots from outside the bar. He called "911."

Emilio Lua arrived at the Cantina at 9:45 p.m. He estimated that he had been in the bar for about 10 minutes when the shooting started. Before it started, he heard voices outside. One voice said, "Help me. Help me." The other voice answered, "Nobody is going to help, I'm the only one that's going to help you son of a bitch." Then, Lua heard two gunshots. He saw Cruz fall backwards into the bar.

The only witness to actually see any part of the shooting was Apolinar Olivera, who arrived at the bar between 10:00 p.m. and 10:30 p.m. wearing a white hat. As he pulled into a stall in the parking lot, he noticed two people "standing there and they were really angry." They were on the sidewalk. One man was sitting cross-legged and the other man was standing next to him, smoking a cigarette. They were about three feet apart.

As Olivera opened the door to step into the bar, both men started to run. The man who had been sitting was running in front of the man who had been standing. The man in front stayed at the entrance to the bar and was shot. Olivera heard the victim say "help me," in Spanish, as he arrived at the door, before he was shot. The other man said "I'm gonna kill you, son of a bitch; there's no one here to help you." Olivera held the door open for the victim. Seconds later, Olivera heard a gunshot. Then, five seconds later, he heard more shots. He closed the door more; he did not want to look. After the second shot, he heard nothing; he let the door go and saw the victim at the entrance, face up. He heard someone running. The police arrived no more than five minutes after the shots ended.

The Investigation

The police were dispatched to the shooting at 10:46 p.m. Olivera was interviewed at the police station by San Jose Police Department Lieutenant Edgardo Garcia.[2] According to Lieutenant Garcia, Olivera said "the shooter was running and got to behind the victim. [¶] As he got behind the victim, he then paused. [¶] Our witness heard what he thought was [*sic*] three to four shots. [¶] After hearing the suspect make some statement, then he continued running." Olivera described seeing the victim fall after being shot.

[2] The interview was electronically recorded and a transcript of the interview was available to Lieutenant Garcia during his testimony.

A pack of cigarettes, $9 in cash, drill bits,[3] and some business cards were found on the sidewalk. A black Honda Prelude parked outside the bar in the parking lot was registered to defendant on Leigh Avenue in San Jose, at defendant's mother's address.

One spent bullet was recovered from the carpet just inside the front door of the Cantina. Two bullet fragments were found on the sidewalk by a Ford Bronco parked near the entrance to the bar. A revolver, four spent bullet casings and two live .38 caliber rounds were found partially buried at a location 3.4 miles away from the Cantina. After defendant's arrest, his clothes were photographed and collected. They had dirt and reddish brown stains on them that were consistent with blood.

On November 13, 2005, the day after the shooting, the police set up surveillance at the Leigh Avenue address. When defendant, three women, and a child left the residence in a Jeep, the police followed the car. In Fremont, defendant got out of the passenger side of the car and got into the driver's seat. He drove to Modesto and parked in front of the police station. As he started to get back into the passenger seat, he was handcuffed and arrested. Defendant wore an elastic ace bandage on his left wrist and complained that it hurt when handcuffs were applied. During the ride from Modesto back to the San Jose Police Department, defendant volunteered: "You know, I have never been in trouble before, but you know, they say you can run, but you can't hide."

Defendant's mother, Martha Diaz, and his wife, Veronica Espinosa, testified for the prosecution. Defendant lived in Modesto and drove his Honda to his mother's house that weekend. That morning, defendant's wife had found him sad, worried, and quiet. According to defendant's wife, they arrived at his mother's house at 11:00 a.m. on Saturday. Defendant left the house at noon and was gone for the rest of the day.

When defendant returned to his mother's house at 11:00 p.m. on that Saturday night, his hand was swollen and he was emotional. In the morning, defendant's car was

[3] Cruz worked in construction and habitually carried drill bits in his pockets.

not there, and a family friend drove them back to Modesto. Defendant's mother, wife and son accompanied him and the family friend on the return trip to Modesto on the day he was arrested. Defendant told his mother that he had been "involved in a problem in a bar at night." During the ride to Modesto, he asked if he was being followed. When he arrived in Modesto, he told his mother and his wife that he was going to turn himself in.

The Autopsy Findings

The cause of death was a "gunshot wound of the neck with cervical spine cord contusion." Cruz suffered two gunshot wounds to the neck. Wound A was surrounded by small abrasions known as stipling. The stipling on Cruz's neck indicated that wound A was inflicted from a distance of one and one-half to two feet. The bullet traveled from left to right and upward. This trajectory did not indicate that the shooter was above or below the victim, only that the shooter was on the victim's left side. The bullet fractured the second and third vertebra down from the skull, caused a contusion of the spinal cord at those two levels, and then fractured the zygomatic bone in the face, which is the cheekbone. Most likely, wound A caused immediate incapacitation, because an injury high up in the spinal cord, in this case just below where the cord exits the bottom of the skull, is going to cause everything below that level to stop working, including eventually the heart and the respiratory system. The angle of the wound was consistent with Cruz being on his knees when he was shot. This bullet wound was fatal.

Wound B was under the victim's hair. There was no stipling around wound B, indicating that wound B was almost certainly caused by a gun that was shot from a distance that was further away than the distance at which wound A, or the wound in the foot, was caused. Wound B would probably not have been fatal, if treated. This bullet entered the victim on the left side of the back of the neck, right where the neck and the skull are connected, and traveled through the soft tissues of the neck without hitting the

brain. The trajectory of the bullet indicated that the gun was most likely to the right of the victim, and the bullet traveled a little bit right to left and downward.

The victim also had a bullet in his left foot. The bullet was shot from a distance of more than two or three feet. The pathologist could not tell if the wound to the foot was inflicted before or after the wounds to the neck, or whether wound A or wound B came first. In addition, Cruz had abrasions on two of his knuckles, which could have been caused by a fall to the sidewalk or by punching someone. He also had abrasions on his nose, which could have been caused by Cruz falling to his knees and hitting his nose against a glass door, or by a punch in the nose that was not forceful enough to break it.

Additional Forensic Evidence

Cruz's hands were encased in paper bags at the scene. Later, the paper bags were analyzed for gunshot residue. Several particles associated with gunshot residue were found on the paper bag encasing Cruz's right hand; one particle associated with gunshot residue was found on the bag encasing Cruz's left hand. Gunshot residue indicates that a person handled or fired a firearm, or was nearby when it was fired.

A criminalist later determined that the spent bullet recovered from Cruz's foot, and the four cartridge cases found at the scene of the shooting, were discharged by the six-cylinder Smith and Wesson revolver recovered by the police. The revolver required 3.75 pounds of pressure to pull the trigger in single action mode (that is, with the operator manually cocking the hammer and pulling the trigger), and 10.5 pounds of pressure to pull the trigger in double action mode (when the operator does not have to touch the hammer but simply pulls the trigger).

The Defense Case

A forensic toxicologist testified as an expert in "pharmacology, specifically alcohol and its effects on the human body, and the estimation of blood alcohol levels." She testified that even at low levels of blood alcohol concentration, such as .02 or .04,

alcohol consumption can loosen inhibitions and impair reasoning, judgment, and self assessment in some individuals. She opined that at a blood alcohol level of 0.26, a person's memory, visual acuity, reaction time, judgment, inhibition, rational thought, and data processing would be "seriously affected." She also opined that a person who weighed 180 pounds and drank seven regular sized beers over a four and one-half hour period would have a blood alcohol concentration of .10.

An orthopedic surgeon testified that on December 8, 2005, he treated defendant for wrist pain. He looked at x-rays which showed a fracture at the wrist end of the distal ulna, which is the smaller of the two arm bones. A radiologist confirmed that radiographs of defendant's wrist showed a fracture to his distal ulna bone.

Defendant testified in his own behalf. At the time of trial he was 34 years old. He weighed approximately 190 lbs. at the time of the shooting. He had never met Cruz before the night of the shooting. That night, he drank seven beers.

On November 12 he drove from his home in Modesto to visit his mother in San Jose, with a loaded gun under the front seat. He did not normally travel with a gun, but on this occasion he put it in the car with a plan to get rid of it. He also planned to commit suicide with it. He decided to kill himself in Santa Cruz, but he missed the exit and ended up in Campbell, near the Pruneyard shopping center. It looked relaxing, so he got out of his car and sat at a nice table in a coffee place for about 15 minutes. Then he went to Barnes and Noble and browsed relationship books for about an hour. He passed Tango's Cantina on his way back to his mother's house and decided to stop in to relieve the stress he had. At that point, he was still thinking about killing himself.

He arrived at Tango's Cantina, a bar he had patronized twice before, at 7:30 p.m. A woman greeted him in the parking lot, introduced herself as Mery, and invited him inside, where she went behind the bar and offered him a drink. He ordered a beer. Defendant and Mery conversed, and they danced to two songs. After 20 minutes, he was approached by Cruz, who had been sitting at the other end of the bar. Cruz questioned

defendant about Mery. He indicated that he was jealous of the attention Mery was paying defendant. He said he wanted to "hook up" with Mery. Cruz smelled like beer, but he seemed normal. Defendant suspected Cruz was Mery's boyfriend, and Cruz made him feel "scared and uncomfortable." Nevertheless, defendant danced to two songs with Mery. After dancing with Mery, defendant returned to his bar stool and continued socializing with Mery. She told him that that Cruz was being "nosy with her" and she did not want to be with him anymore. Soon, Cruz sat next to defendant and started talking about Mery again. Cruz asked if defendant was "interested" in Mery.

According to defendant, Cruz argued with him about Mery throughout the evening. At one point, Mery moved away from them because their argument was becoming more heated. "[Cruz] was getting more . . . personal, started mentioning where he was from, his home town, he told me that over there his people, when something like that happens, when somebody plays with somebody else's girlfriend, they don't mess around, I should be careful what I'm doing, 'cause I just don't know where I could end up." This went on for about an hour. Finally, Cruz bought defendant a beer and told him to make it his last. Defendant got quiet and looked at Cruz. Then, suddenly, Cruz head-butted defendant in the forehead. At this point, defendant moved to a table, and Cruz threw a piece of lemon at his back. Defendant did not leave the bar because "I was trying to explain myself. [¶] Also I was talking to Mery, and I just didn't want to leave like that at that point, and I was scared. [¶] I . . . was trying to get back to my senses, and figure out how I was going to get out of that situation." He stayed at the table another hour, watching people dance. He was not concerned for his safety at that point because he "had other issues" that were more important to him.

Cruz came over to defendant's table to talk about Mery again. He asked defendant to go outside with him; defendant complied. Outside, Cruz told defendant to leave and threatened to do something to him if he didn't. Defendant said he was leaving, but he went back inside and sat down at a table. He wanted to finish his beer and say goodbye

to people. Cruz came to the table. Defendant did not have enough cash in his wallet to pay his tab, so he went to his car to see if he could find more money. Cruz followed him to the car and slammed the door on defendant's leg. This angered defendant, and he felt around in the car for something he could throw at Cruz. He found the gun he had left under the driver's seat, grabbed it, and got out of the car; he was scared. He had no plan.

Defendant got out of the car and attempted to hit Cruz on the head with the gun, but Cruz struggled with defendant to get control of the gun. They struggled over to some bushes and fell on them. During the struggle, several things fell out of Cruz's pants.

Defendant dropped the gun and it landed on the sidewalk. Cruz stood up and just looked at the gun. Defendant told him, "go ahead," meaning "shoot me." Cruz took the gun but he did not shoot defendant. Actually, Cruz only intended to pick up the gun, but defendant kicked away it with his leg, and Cruz just let go. Then defendant told Cruz in Spanish "to get the hell out of here and run that way so I can get out of here." Instead, Cruz headed for the bar.

At this point, defendant was "really scared." He picked up the gun and ran after Cruz. He didn't stay where he was, or leave, because "[m]y car was right there in front of the door and I needed my car to get away." He did not wait until Cruz disappeared into the bar because he "wasn't thinking [¶] . . . [¶] I was confused, scared, mad, all kind of . . . things." His intention was not to shoot Cruz. It was "just to grab him and prevent him from going inside the bar" and getting his friends or cousins to help him. Just as Cruz reached the bar's door, he heard Cruz say the plural of "Ayúdame" in Spanish, "which is . . . help me, but asking more than two people for help." This really scared defendant.

Defendant intended to run to his car. Then Cruz turned towards him "and I lift[ed] my right hand with the gun in it and I – I – didn't aim at him directly, but my hand was pointing at him." The gun was pointed "somewhere in his neck." Then he pulled the trigger. Just before he pulled the trigger he said to Cruz, in Spanish, "who is gonna come

out to help you now, you f----ed." He said these words because he was mad and he was in pain; he had hurt his wrist in the struggle. Although he pointed the gun at Cruz's neck, he was only trying to injure him, and it never occurred to him that he might kill Cruz. Asked by his attorney what was going through his mind at that moment, defendant replied, "Well, that, just, it was all – I mean, it was all, you know, everything happened so fast. [¶] We were just mad, you know, I'm sorry for this." After defendant pulled the trigger, Cruz fell. Defendant was "right by his side" and fell with him, accidentally pulling the trigger a second time. He denied that he pulled the trigger a third time, hypothesizing that the injury to Cruz's foot was probably from a redirected round. He admitted that he intended to pull the trigger the first time, but not the second time.

Defendant saw Cruz's "body laying on the floor without movement" and he stood up and started walking. First he went to his car, but he was shaking so badly he could not open the door to get in. He walked into a liquor store and went to the refrigerator, but he walked out without buying anything. He walked until he got to a dark spot under a tree. He wanted to kill himself, and aimed the gun at his head, but he could not pull the trigger. Instead, he wiped the gun to get rid of his fingerprints, unloaded the gun and buried it in some debris under the tree.

Defendant went to his sister's and mother's house on Leigh Avenue and went to bed, but he could not sleep because of the pain in his wrist. Early the next morning, he took a bus to a drugstore and purchased pain medication and an ace bandage. A friend of his mother's drove him and his family part way back to Modesto. At a church, he took over the driving. He knew he was being followed by the police. In Modesto, he parked outside a police station but was arrested before he could turn himself in.

He was not entirely truthful when he was interviewed by the police. He told them that Cruz had the gun and that he (defendant) threw the gun away in the Cantina's parking lot. He lied because he was scared. He had never been in trouble before and did not know what to say.

Rebuttal

Norma Mery Coa was working as a bartender the night of the shooting. She talked for about 10 minutes with a man, but she did not think that man looked like defendant. She did not talk to Cruz that night and he did not express any romantic interest in her.

DISCUSSION

Insufficiency of the Evidence: Premeditation and Deliberation

Defendant concedes the record contains substantial evidence of intent to kill, but contends the evidence does not establish premeditation and deliberation. Citing *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), defendant argues that in order to conclude that a first degree murder verdict is supported by substantial evidence of premeditation and deliberation, the reviewing court must satisfy itself that the record contains (1) facts that show planning activity; or (2) facts that show motive to kill; and (3) facts about the nature of the killing, from which the jury could have inferred that the defendant intentionally killed according to a particular reason. In combination, the evidence must support the further inference that "the killing was 'the result of pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed.' " (*Id.* at pp. 26-27.) "Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Id*. at p. 27.) Defendant argues that the evidence in this case does not satisfy the *Anderson* framework because there was no evidence of motive, scant evidence of planning, and the fact that Diaz shot Cruz twice in the neck at point blank range does not show that that shooting was "so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design to take the victim's life in a particular way" (*Anderson, supra,* 70 Cal. 2d at p. 27), because the

surrounding circumstances show that "Diaz shot as a result of a rash impulse hastily executed, and not as a result of calculation." For the reasons we explain below, we disagree.

Relevant Legal Principle

In reviewing a claim of insufficiency of the evidence on appeal, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) "An appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425; accord, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence. . . . An appellate court must accept logical inferences that the [trier of fact] might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Anderson " 'identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing. However, . . . "*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." ' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1249 (*Steele*).)

Analysis

Here, defendant is correct that evidence of motive for the killing was absent. However, in our view there was sufficient evidence from which a properly instructed jury[4] could infer that " 'the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse.' " (*Steele, supra*, 27 Cal.4th at p. 1249.) First, there was evidence of planning. Defendant drove to San Jose from Modesto with a loaded gun in his car. In his testimony, he admitted that he had a "plan" for the gun – to get rid of it, or to kill himself with it. The jury was entitled to believe that he had a plan, but reject his explanation of it. A rational jury could also have inferred that defendant either brought the gun into the bar, or retrieved it from his car during one of the two times he left the bar with Cruz. Defendant argues that "it would have been apparent to everyone" if he had brought a gun into the bar because he was wearing jeans and a T-shirt, but the jury could have inferred otherwise. In any event, defendant admitted in his testimony that he retrieved the gun from his car. Again, the jury could have believed that part of his testimony, but rejected his explanation.

Defendant stresses that there was no evidence he knew Cruz. He testified that he did not know Cruz. But witnesses at the bar saw him come in and sit next to Cruz, and they saw him talk to Cruz throughout the evening in a seemingly normal and friendly way. The jury was entitled to reject defendant's testimony and infer from the testimony of the witnesses that the two men had some prior acquaintance, though the nature of it was not revealed at trial. From the inferences of planning and prior acquaintance, it was "reasonable to infer that he considered the possibility of homicide from the outset." (*People v. Alcala* (1984) 36 Cal.3d 604, 626, superseded by statute on another point as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911.)

[4] The trial court correctly instructed the jury on premeditation and deliberation.

However, the strongest evidence that defendant acted from preexisting reflection rather than from unconsidered or rash impulse, came from the two witnesses, Flores and Olivera, who reported that the shooter *paused* between shots. From these pauses, the jury was entitled to infer that defendant considered the choices available to him – to shoot to kill or to cease shooting – and chose to continue shooting. Furthermore, the forensic evidence showed that Cruz was shot at point blank range. This finding was corroborated by defendant's own admission that he was so close to Cruz when he pointed the gun at Cruz's neck and pulled the trigger that when Cruz fell, defendant fell with him. The evidence also included the testimony of witnesses who heard the victim plead "help me, help me," and then heard the shooter say "I'm gonna kill you, son of a bitch" and "there's no one here to help you," before firing the shots. From the evidence that defendant chased down Cruz, shooting and pausing, and shooting and pausing, and finally pointing the gun at Cruz's neck and shooting him from point blank range, while Cruz was on his knees and begging for help, a rational jury was entitled to conclude that, as the prosecutor argued, this was "a cold blooded execution." In sum, the evidence from which the jury could infer that defendant had some kind of prior acquaintance with Cruz, formed a plan to kill him, and facilitated the killing by encouraging Cruz to drink to excess, coupled with the evidence concerning the manner of killing, was sufficient to support the jury's verdict of first degree murder.

Prosecutorial Misconduct: Misstatement of the Elements of Voluntary Manslaughter

Relying on *People v. Najera* (2006) 138 Cal.App.4th 212, defendant contends the prosecutor committed misconduct in closing argument by misstating the law of manslaughter. For the reasons that follow, we disagree.

Factual Background

Prior to argument, defense counsel requested an "advance ruling" to limit the prosecutor's argument on heat of passion, citing *People v. Najera*, *supra*, 138

Cal.App.4th 212. The trial court refused to issue such a ruling, but stated: "[W]e discussed that at some length with respect to the prosecution's arguments and I'm basically cautioning the People to be aware of that case, and I think I'm satisfied that the People are aware of that case and will make their arguments as are appropriate and consistent with the law, and those issues will be adequately made without a court ruling."

Much of the prosecutor's opening argument related to voluntary manslaughter. No objection was interposed to any of it. A portion of the prosecutor's rebuttal argument was also devoted to voluntary manslaughter. At the end of his remarks on this topic, the prosecutor stated: "[V]oluntary manslaughter is going to be reserved only for those special cases where the provocation from that victim was so extreme that a person of average disposition is going to react in the same situation under the same circumstances not from judgment, but from passion, and then a ratuonal (*sic*) - -" Defense counsel cut the prosecutor off, objecting "to the statement of law regarding voluntary manslaughter." The court responded: "Ladies and Gentlemen, I'll instruct you on the law and you will follow my instructions. [¶] This is argument." The prosecutor then continued: "And that is a correct statement of the law as much as [defense counsel] may not like it, but his honor will redo the instructions tomorrow and that will confirm that that is an absolute correct statement of the law. [¶] Don't take that bait or fall for that argument that simply flipping someone off when they cut you off on the freeway is the type of provocation that the law of voluntary manslaughter addresses, and if it did, heaven help us." With those words the prosecutor ended his summation.

After the jury had been dismissed for the day, defense counsel unsuccessfully moved for a mistrial based on the prosecutor's remarks. Alternatively, he asked that the jury be admonished that "they were given an incorrect[] statement of the law by the prosecutor and for them to know that the instruction or the correct version of the law is in

the CALJIC instruction." The court stated, "I think, that's a reasonable response . . . under the circumstances."[5]

Relevant Legal Principles

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Analysis

On appeal, defendant contends that the objected-to remarks misstated the law of provocation and heat of passion in much the same way the prosecutor's remarks did in *Najera*. We disagree.

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[5] Before instructing on the elements of manslaughter, the trial court admonished the jury as follows: "You must accept and follow the law as I state it to you, regardless of whether you agree with it. [¶] If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions."

In *Najera*, the prosecutor argued: " 'Heat of passion is not measured by the standard of the accused. We don't care what the accused did. We don't care what the standard is for the accused. As a jury, you have to apply a reasonable, ordinary person standard, okay. [¶] Going back to that intruder hypothetical. *Any reasonable, ordinary person walking in on a child being molested, if they had a gun in their hand, would probably do the same thing.* It's that same hypothetical that was given to you in voir dire by defense. Remember the spider in the sink, the reasonable spectrum? *Would a reasonable person do what the defendant did?* Would a reasonable person be so aroused as to kill somebody? That's the standard.' (Italics added.) [¶] During rebuttal, the prosecutor stated: '[*T*]*he reasonable, prudent person standard . . .* [*is*] *based on conduct, what a reasonable person would do in a similar circumstance.* Pull out a knife and stab him? I hope that's not a reasonable person standard.' " (*Najera, supra,* 138 Cal.App.4th at p. 223.)

The *Najera* court held that "[t]he italicized portions of the prosecutor's statements are incorrect. An unlawful homicide is upon ' "a sudden quarrel or heat of passion" ' if the killer's reason was obscured by a ' "provocation" ' sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) The focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Najera, supra,* 138 Cal.App.4th at p. 223.)

Here, the prosecutor's comment did not state that the manslaughter inquiry centered on whether the reasonable person would *kill* under the same circumstances. The prosecutor stated: "[V]oluntary manslaughter is going to be reserved only for those special cases where the provocation from that victim was so extreme that a person of average disposition is going to react in the same situation under the same circumstances

not from judgment, but from passion, and then a ratuonal (*sic*) - -" (Italics added.) In our view, this statement did not imply that voluntary manslaughter is reserved for cases in which the person of average disposition would react by killing the provocateur. Reviewing the prosecutor's remarks in the context of his whole argument, we are satisfied that there is no reasonable likelihood the jury would have interpreted the prosecutor's remarks to mean that defendant was not entitled to a manslaughter verdict unless a reasonable person would have killed in the same circumstances. In any event, the trial court cautioned the jury that in case it found the attorneys' remarks at odds with the court's instructions, the jury was to follow the court's instructions. The court correctly instructed the jury on manslaughter. The prosecutor's comment was brief. No misconduct appears.

Refusal to Permit Argument or Modify Intoxication Instructions Concerning the Effect of Voluntary Intoxication on the Subjective Component of Heat of Passion

Defendant argues in this court that the trial court committed reversible error by refusing to let him argue, and refusing to instruct the jury, that it could consider defendant's intoxication on the question whether he actually killed in the heat of passion. Citing *Steele, supra,* 27 Cal.4th 1230, defense counsel requested that the trial court permit him to argue that voluntary intoxication can be considered on the subjective component of voluntary manslaughter, that is, the question whether defendant actually killed in the heat of passion. Defense counsel sounded his request in the Fourteenth Amendment's due process clause and the Sixth Amendment's right to effective assistance of counsel. Defense counsel also requested that the trial court modify its instructions on voluntary intoxication so as to permit the jury to consider the effect of defendant's intoxication on the question whether he subjectively acted in the heat of passion. The trial court denied both requests.

The trial court gave CALJIC numbers 4.22 and 4.21.1 on voluntary intoxication, as follows. "Intoxication of a person is voluntary if it results from the willing use of any

intoxicating liquor, drug or other substance, knowing that it is capable of an intoxicating effect, or when he willingly assumes the risk of that effect. [¶] . . . [¶] It is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reasons of that condition. [¶] However, there is an exception to this general rule, namely, where *a specific mental* state is an essential element of the crime. [¶] In that event, you should consider the defendant's voluntary intoxication in deciding whether defendant possessed the required specific intent *or mental state* at the time of the commission of the alleged crime. [¶] Thus, in the crime charged in Count 1 or the lesser crime of murder in the second degree or *voluntary manslaughter*, a necessary element is the existence in the mind of the defendant of a certain specific intent *or mental state* which is included in the definition of the crime set forth elsewhere in these instructions. [¶] If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not that defendant had the required specific intent *or mental state*. [¶] If from all the evidence you have a reasonable doubt whether the defendant had the specific intent *or mental state*, you must find that defendant did not have that specific intent *or mental state*." (Italics added.)

Defendant bases his argument primarily on the following language in *Steele*. "The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . [¶] Defendant's evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War, and that he just 'snapped' when he heard the helicopter, may have satisfied the subjective element of heat of passion. (See *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798, citing *People v. Berry* [1976] 18 Cal.3d at p. 515.) But it does not satisfy the objective, reasonable person requirement, which requires provocation by the victim. (*In re Thomas C.*, *supra*, 183 Cal.App.3d at p. 798.)

. . . [¶] As far as manslaughter is concerned, defendant's evidence, if anything, shows diminished capacity, not heat of passion. 'Provocation and heat of passion are not synonymous with diminished capacity.' [Citation.] 'The essence of a showing of diminished capacity is a "showing that the defendant's mental capacity was reduced by *mental illness, mental defect or intoxication*." ' [Citation.] However, the Legislature *abolished* the defense of diminished capacity before defendant committed this crime. [Citations.] Only diminished *actuality* survives, i.e., the jury may generally consider evidence of voluntary intoxication or mental condition in deciding whether defendant actually had the required mental states for the crime. [Citations.] The trial court instructed the jury on this point." (*Steele*, *supra*, 27 Cal.4th at pp. 1252-1253.)

In re Thomas C. does not shed any further light on this passage. That case states only: "Minor may well qualify for the subjective element of the heat of passion test, that the actor be under the actual influence of a strong passion at the time of the homicide. As our Supreme Court pointed out in *People v. Berry*[, *supra*,] 18 Cal.3d 509, 515 . . . the 'passion' in the statute defining manslaughter 'need not mean "rage" or "anger" but may be any "[v]iolent, intense, high-wrought or enthusiastic emotion". . . .' (*People v. Berry*, *supra*, at p. 515.) [¶] Nonetheless, the objective or reasonable person element of sufficient provocation has not been met. Minor's depressed mental state cannot be the provocation since the provocation must be from the victim." (*In re Thomas C.*, *supra*, 183 Cal.App.3d at p. 798.)

Assuming without deciding that the trial court should have instructed on voluntary intoxication and the subjective component of heat of passion, we assess the prejudice from the error under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Manriquez* (2005) 37 Cal.4th 547, 585-586). In our view, it is not reasonably probable that the jury would have returned a manslaughter verdict in the absence of the assumed error. First, the instructions on voluntary intoxication (CALJIC nos. 4.22 and 4.21.1) told the jury to consider its effect "in deciding whether defendant possessed the required specific intent

or *mental state* charged in Count 1 or the lesser crime of murder in the second degree or *voluntary manslaughter*." (Italics added.) Furthermore, the instructions given to the jury provided numerous additional opportunities to resolve the factual question posed by the omitted instruction—whether defendant actually killed in the heat of passion, or premeditated and deliberated murder. (CALJIC 8.73 [Evidence of Provocation May Be Considered in Determining Degree of Murder]; CALJIC 8.20 [Deliberate and Premeditated Murder]; CALJIC 8.30 [Second Degree Murder as Lesser Included Offense of Count 1]; CALJIC 8.71 & 8.72 [Doubt as between First Degree and Second Degree Murder and Manslaughter].) Heat of passion cannot co-exist with premeditation and deliberation. Thus, the factual question posed by the omitted instruction was answered adversely to defendant's position under the instructions given.

In any event, there was overwhelming evidence that this homicide was murder, not manslaughter, because evidence of provocation by the victim that would have caused a reasonable person of average disposition to act rashly and without deliberation was absent here. (*People v. Najera, supra*, 138 Cal.App.4th at pp. 225-226; *People v. Manriquez, supra*, 37 Cal.4th at p. 585.) Thus, even if we view prejudice through the lens of *People v. Sedeno* (1973) 10 Cal. 3d 703 (overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142), or of *Chapman v. California* (1967) 386 U.S. 18, 24, as defendant argues we should, we conclude that the error was harmless.

CONCLUSION

Substantial evidence supports the jury's first degree murder verdict. The prosecutor did not misstate the law of manslaughter in closing argument. If the trial court erred in refusing to instruct the jury or permit defense counsel to argue to the jury that voluntary intoxication could be considered on the subjective component of heat of passion, any such error was harmless under any standard.

DISPOSITION

The judgment is affirmed.

_____
McAdams, J.

WE CONCUR:

_____
Mihara, Acting P.J.

_____
Duffy, J.